THE PROGRESS OF THE LAW, 1918–1919

TRUSTS[1]

"OF all the exploits of Equity the largest and the most important is the invention and development of the trust." So Professor Maitland was accustomed to tell his students; and so indeed it is. The law of trusts, being comparatively modern, has developed more systematically, more symmetrically than the older branches of the law. Its general principles are for the most part now well settled; and most of the numerous current decisions relating to trusts involve mere questions of fact, of construction of written instruments. But there have been a considerable number of recent cases involving important questions of principle. The law of trusts has not ceased to grow. And as long as the institution of private property and the power of testamentary disposition continue to exist, it is safe to predict that the trust, the most effective instrument in effecting the disposition of private property, will hold its place in Anglo-American law. And as long as men succeed in dishonestly acquiring or retaining property, the remedy of the imposition of a constructive trust will continue to be the most effective weapon of redress.

THE NATURE OF A TRUST

Although perhaps no perfect definition of a trust has been or can be framed, yet it is clear that certain elements are necessary to constitute a trust. There must be a trust *res* held by the trustee. The trust *res* may be an interest, legal or equitable, in property, real or personal, tangible or intangible. The obligee may

[1] This is the sixth article in a series written by professors in the Harvard Law School in which it is intended to point out the most notable decisions, books, articles, and statutes, coming under the notice of the author, which affect or explain the law in the topic under discussion. The following articles have appeared: Joseph H. Beale, "The Conflict of Laws," 33 HARV. L. REV. 1; Austin W. Scott, "Civil Procedure," 33 HARV. L. REV. 236; Zechariah Chafee, Jr., "Bills and Notes," 33 HARV. L. REV. 255; Roscoe Pound, "Equity," 33 HARV. L. REV. 420; Joseph Warren, "Wills and Administration," 33 HARV. L. REV. 556. The series will be continued in the April number. — ED.

be trustee of a *chose* in action. But the obligor cannot. And one cannot be trustee of a promise made by himself to himself; he cannot, for instance, be trustee of his own note.

These principles seem so clear and so fundamental that it is astonishing that courts should occasionally lose sight of them. In *Re Leigh's Estate* [2] the defendant's testator made a note whereby he promised to pay to a church the sum of $8,000. The payee marked the note paid and gave it back to the defendant's testator, who thereupon signed and delivered to the payee an instrument wherein he acknowledged the receipt of $8,000 and declared himself trustee of this sum for the payee. The court was of the opinion that a valid trust was thereby created. The court said: "His [the testator's] note, when made and delivered to the church, was property in the hands of the latter, and its return to him as trustee was a sufficient designation and setting apart of such sum as a trust fund to be accounted for as provided in the declaration of trust; as much so in fact for all the purposes of the law as if, instead of the making and transfer of the note, [the testator] had first paid and delivered the sum of $8,000 in actual money to the church which thereupon returned it to him in trust for the purposes named." [3] But what was the trust *res?* If this were a trust, then any gratuitous promise to pay a sum of money might well be held to create a trust, and the requirement of consideration in the formation of a contract would become a mere matter of form. If the abolition of the requirement of consideration in the formation of contracts is desirable, it should be accomplished directly and openly and not by confusing contracts with trusts.

In *Legniti* v. *Mechanics & Metals National Bank* [4] it appeared that the plaintiff, a private banker in New York, wishing to transfer funds by cable to a bank in Naples, gave a certified check to a firm of private bankers and brokers which carried on in New York an extensive foreign exchange business and which had money or credit with the Naples bank. The firm deposited the plaintiff's check in its general account with the defendant bank, and failed

[2] 173 N. W. (Iowa) 143 (1919).

[3] *Ibid.*, 146. The court was probably right in holding the defendant liable, because it was possible to spell out consideration for the note, in which case the surrender of the note was a valid consideration for a promise to pay $8,000. There was a contract, but not a trust.

[4] 186 App. Div. 105, 173 N. Y. Supp. 814 (1919).

the next day, without having cabled to the Naples bank. The court held that the firm received the check upon trust, and that the plaintiff could follow it into the account with the defendant bank. There is a strong dissenting opinion by Shearn, J., who contended that the transaction was a contract for the sale of credit, and that although the firm was liable for breach of contract, it was not trustee of the check or its proceeds. It would seem that the view of the dissenting justice is right; surely it was not intended that the firm should hold the check or its proceeds as a separate fund for the benefit of the plaintiff.[5]

CONSIDERATION

As a result of Lord Eldon's decision in *Ex parte Pye*,[6] it is well settled that a gratuitous declaration of trust is valid. In a few early cases when an intended gift failed for lack of delivery of the subject matter of the gift or of a deed,[7] the courts tortured the transaction into a declaration of trust.[8] It is now held, however, that an imperfect gift cannot be upheld as a declaration of trust.[9] If the donor intends to give away property, he cannot be held to have retained it on trust. A somewhat similar question may

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[5] See 33 HARV. L. REV. 279 (1919); 19 COL. L. REV. 322 (1919).

For another instance of the confusion between a debt and a trust, see Myers *v.* Washington Trust Co., 105 Atl. (R. I.) 565 (1919). In that case a savings bank transferred all its assets to the defendant trust company, which assumed its liabilities and undertook to pay its depositors. The plaintiff had deposited a sum of money with the savings bank which by mistake had paid the amount of the deposit to one who was not authorized by the plaintiff to receive payment. The court held that the trust company was not liable, because the money deposited by the plaintiff had never come into its possession and that "the defendant cannot be held liable as the trustee of a fund which never came into its possession."

[6] 18 Ves. 140 (1811); SCOTT, CASES ON TRUSTS, 143.

[7] It was formerly held in England that an oral gratuitous transfer of a *chose* in action represented by a mercantile or common-law specialty was invalid, although the specialty or a deed of gift was delivered. Edwards *v.* Jones, 1 Myl. & C. 226 (1836) (bond); Milroy *v.* Lord, 4 D., F. & J. 264 (1862) (stock certificate). But see Fortescue *v.* Barnett, 3 Myl. & K. 36 (1834) (insurance policy). The opposite view was taken in the United States. CAS. TRUSTS, 152–165. It is now held in England that in view of the provisions of the JUDICATURE ACT (1873), 36 & 37 Vict. c. 66, sec. 25, sub.-s. 6, a gratuitous oral transfer by delivery of a specialty *chose* in action is valid. *Re* Lee, [1918] 2 Ch. 320 (exchequer bond deposit book); *Re* Westerton [1919], 2 Ch. 104 (deposit receipt).

[8] Morgan *v.* Malleson, L. R. 10 Eq. 475 (1870); CAS. TRUSTS, 147.

[9] Richards *v.* Delbridge, L. R. 18 Eq. 11 (1874); CAS. TRUSTS, 148–151.

arise when an obligee of a *chose* in action wishes to extinguish it. A gratuitous parol forgiveness of a *chose* in action is not valid. In the absence of consideration, there must be either a release under seal, or, if the *chose* in action is represented by a specialty, a surrender or cancellation of the specialty. There seems to be no good reason, however, why an obligee cannot orally and gratuitously declare himself trustee of the *chose* in action for the obligor. And if the obligee is trustee for the obligor, the obligor has an equitable defense to the *chose* in action, based on the prevention of circuity of action. Under the doctrine of *Ex parte Pye* it would seem that the intention to create a trust is all that is necessary. In *Cardoza* v. *Leveroni*[10] the holder of a note and mortgage orally and gratuitously forgave the mortgagor. The court held that the mortgagor was still liable. There was no intention to create a trust, and an invalid forgiveness of a debt cannot be twisted into a valid declaration of trust.

Can a hope of inheriting property or receiving property under a will be made the subject matter of a trust? A contract to convey or to become trustee of property which may in the future be inherited or received under a will, is binding if made for a consideration or if under seal,[11] and if not unfair, fraudulent, or against public policy.[12] But such a mere expectancy or *spes* cannot be made the subject matter of a gift.[13] Similarly, such an expectancy cannot be a trust *res*. It was so held in *Re Lynde's Estate*.[14]

The Statute of Frauds

By the seventh section of the English Statute of Frauds a writing is required if a trust of land is created; by the ninth section a writing is required if the interest of the *cestui que trust* is transferred. There is no provision expressly making a writing necessary for the extinguishment of a trust. May the *cestui que trust* give

[10] 233 Mass. 310, 123 N. E. 672 (1919).

[11] *Cf.* Sloan *v.* Breeden, 233 Mass. 418, 124 N. E. 31 (1919) (contract by next of kin of insured to assign interest in life insurance policy payable to legal representatives of insured).

[12] Cas. Trusts, 179, note.

[13] *Re* Ellenborough, [1903] 1 Ch. 697; Cas. Trusts, 175.

[14] 175 N. Y. Supp. (Surr. Ct.) 289 (1919). See s. c., 105 Misc. 30, 172 N. Y. Supp. 523 (1918).

a valid oral release to the trustee? In *Hatcher* v. *Hatcher* [15] the court held not. In substance the *cestui que trust* is transferring his beneficial interest, although the transfer takes the form of the extinguishment of his equitable interest. Moreover, since the eighth section of the Statute of Frauds provides that no writing is necessary in a case where a trust arises or is transferred *or extinguished* by operation of law, it appears to have been intended to require a writing where a trust is extinguished by act of the parties.[16] In *Matthews* v. *Thompson* [17] it was held that where the *cestui que trust* in writing directed the trustee to convey to a third person, intending to allow the third person to take free of the trust, the trust was extinguished. This decision is perhaps distinguishable from *Hatcher* v. *Hatcher* on the ground that a transferee of trust property becomes constructive trustee only if he is colluding in or is unjustly enriched by a breach of trust, and that there was no breach of trust because the trustee conveyed with the assent of the *cestui que trust.*

It is generally held that an oral trust of land is not void but merely unenforceable. If a memorandum is given subsequently to the creation of a trust, the trust becomes enforceable, at least as against the trustee. The courts have held that it becomes enforceable also against the general creditors of the trustee, against his judgment creditors, and even against his trustee in bankruptcy.[18] It was so held in *Moran* v. *Morgan*,[19] and in *Wilmer* v. *Dunn*.[20] In the former case Learned Hand, J., suggests a doubt as to the correctness of the doctrine; and it would seem that it opens the door to fraud, a door which it was the purpose of the statute to close.

Statutes of Wills

In New York, when money is deposited in a savings bank in the name of the testator "in trust for" another, the courts have held

[15] 107 Atl. (Pa.) 660 (1919).

[16] But see *contra*, Gorrell *v.* Alspaugh, 120 N. C. 362, 27 S. E. 85 (1897); Warren *v.* Tynan, 54 N. J. Eq. 402, 34 Atl. 1065 (1896). These were both cases of an extinguishment of a resulting trust. There is a dispute on the question whether a contract for the sale of land may be rescinded by parol. See cases cited, Cas. Trusts, 205.

[17] 186 Mass. 14, 71 N. E. 93 (1904); Cas. Trusts, 202.

[18] Gardner *v.* Rowe, 2 Sim. & St. 346 (1825), 5 Russ. 258 (1828); Cas. Trusts, 199.

[19] 252 Fed. (C. C. A. 2) 719 (1918).

[20] 133 Md. 354, 105 Atl. 319 (1918).

that presumptively a "tentative trust" is created; that is to say, the depositor may withdraw the money at any time during his lifetime, but there is a valid trust as to any part of the deposit remaining at the time of his death.[21] This doctrine has recently been followed in Minnesota.[22] The doctrine seems to carry out the probable intention of the depositor; it also affords a simple method of disposing of his money on his death. But does it not violate the provisions of the statutes of wills? Is not the deposit in reality a testamentary disposition? It has been held in New Jersey that it is.[23] Similarly the New Jersey courts have recently held invalid a deposit in the name of the depositor *or* his wife, it appearing that he intended to reserve power at any time until his death to revoke her authority to withdraw the deposit.[24]

Charitable Trusts

The House of Lords has recently handed down a decision of great importance to some two millions of people in England. The English courts have for centuries held bequests for masses illegal, as bequests for "superstitious uses." In *Bourne* v. *Keane*,[25] however, the House of Lords has upheld bequests to a cathedral and to certain Jesuit fathers for masses. It is not clear from the opinions whether or not their lordships regarded the bequests as charitable.[26] There was no discussion of the problem whether, if trusts for masses are not charitable, the absence of any one to

[21] Matter of Totten, 179 N. Y. 112, 71 N. E. 748 (1904); Cas. Trusts, 218. It may be shown, however, that the depositor did not intend to create a trust, or that he intended to revoke it. Walsh *v.* Emigrant, etc. Bank, 106 Misc. 628, 176 N. Y. Supp. 418 (1919). On the other hand, it may be shown that he intended to make the trust irrevocable during his lifetime. See cases cited, Cas. Trusts, 224.

[22] Walso *v.* Latterner, 140 Minn. 455, 168 N. W. 353 (1918), s. c. 173 N. W. (Minn.) 711 (1919). See 4 Minn. L. Rev. 56 (1919).

[23] Nicklas *v.* Parker, 71 N. J. Eq. 777, 61 Atl. 267 (1907).

[24] Morristown Trust Co. *v.* Captstick, 106 Atl. (N. J. Eq.) 391 (1919); 4 Minn. L. Rev. 72 (1919). The depositor expressed his intention in the following words: "Dearie, I have opened a joint account in the Morristown Trust Company with you, and you may draw on it to the full amount; but, if you do, I will give you hell." See Cas. Trusts, 216, note.

[25] [1919] A. C. 815.

[26] The Court of Appeals of New York has recently held, in accordance with the weight of authority in the United States, that a bequest for masses is charitable. Matter of Morris, 227 N. Y. 141, 124 N. E. 724 (1919) (holding that the amount to be expended need not be "reasonable").

enforce them is a fatal objection to their validity.[27] The decision, at any rate, when coupled with the decision in *Bowman* v. *Secular Society*,[28] which upheld a bequest to a registered society organized for the promotion of atheism, shows that the law lords have attained a rather remarkable degree of liberality of opinion on religious questions.

In a recent Irish case, *Re Moore*,[29] a testator bequeathed £10,000 to whoever might be Pope at his death "to use and apply at his sole and absolute discretion in the carrying out of the sacred office." The executor brought a summons to determine the validity of the bequest. It was held that the bequest was intended not to be absolute but upon trust, and that the trust was not valid because it was not a charitable trust and there was no definite *cestui que trust*. If the trust was not charitable it would of course be invalid under the doctrine of *Morice* v. *Bishop of Durham*.[30] But was it not a charitable trust? The court thought not, because the Pope might "in the carrying out of the sacred office" apply the legacy for non-charitable or even illegal purposes. Probably the chief obstacles in the mind of the court were the Supreme Pontiff's directorship of the three great monastic orders,[31] and his claim to temporal power. The decision, it must be confessed, is rather startling.[32]

A narrow view as to the scope of charitable trusts, but one which has considerable authority behind it,[33] was also taken in *Smith* v. *Pond*,[34] where a bequest was made to the trustees of a certain Methodist church "for support of the church or such benevolent purposes as the trustees of said church shall direct." The court held that "benevolent" was broader than "charitable," and that the bequest failed.[35] On the other hand, in *Coffin* v. *Attorney General*,[36] a bequest to be devoted to "missions and like good objects" as the trustees should think best, was upheld; and in

[27] See CAS. TRUSTS, 282–284.

[28] [1917] A. C. 406. See 31 HARV. L. REV. 289.

[29] [1919] 1 I. R. 316.

[30] 10 Ves. 521 (1805); CAS. TRUSTS, 268.

[31] Bequests to these orders are illegal in Ireland. Ellard *v.* Phelan, [1914] 1 I. R. 76.

[32] Compare the cases cited in CAS. TRUSTS, 275–277, 281.

[33] CAS. TRUSTS, 275–277.

[34] 107 Atl. (N. J. Eq.) 800 (1919).

[35] See 29 YALE L. J. 242 (1919).

[36] 231 Mass. 575, 121 N. E. 397 (1919).

Miller v. *Tatum*,[37] a bequest to a church "to aid the church in its local work" and a bequest "to foreign missions" and a bequest of money to "be sent to the country and destitute places that the poor may have the gospel preached to them" were upheld.[38] The mere fact that the purpose of a charitable trust is left indefinite is not fatal according to the better view and the weight of authority, provided it is limited to charitable purposes. Thus a bequest "to charity $100, to be distributed by" a certain person, was upheld in *Re Welch*.[39] If the trustee who was to make the distribution should die, the trust will fail if, but only if, the testator contemplated a distribution by that particular person as an essential part of his scheme.[40]

In *Robinson* v. *Crutcher*,[41] bequests "to the capital of" certain township, county, and state school funds were held to fail because no trustees were named, although the testator directed his executor to pay over the bequests "to the lawful custodians of the several public school funds mentioned." The court was of the opinion that direct gifts to the funds were intended, which failed because a fund could not be a legatee, that there was no attempt to create a trust, and that the court therefore could not designate a trustee. On this reasoning a gift to the Harvard Endowment Fund instead of to the trustees of that fund would fail. The technicality of this decision can only be equalled by the decisions in New York that a direct gift to an unincorporated charitable association cannot be upheld as a charitable trust.[42]

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[37] 181 Ky. 490, 205 S. W. 557 (1918).

[38] See CAS. TRUSTS, 275–277, 339–341.

There have been a number of recent cases of church schisms, with a resulting legal fight for church property. See Manning *v.* Yeager, 79 So. (Ala.) 19 (1918), 82 So. 435 (1919) (Baptist); Tucker *v.* Paulk, 148 Ga. 228, 96 S. E. 339 (1918) (Baptist); Illinois Classis *v.* Holben, 286 Ill. 473, 122 N. E. 46 (1919) (Reformed Church); Stallings *v.* Finney, 287 Ill. 145, 122 N. E. 369 (1919) (Apostolic Faith); Bendewald *v.* Ley, 168 N. W. (N. D.) 693 (1918), 32 HARV. L. REV. 180 (1918) (Lutheran); Attorney General *v.* Armstrong, 231 Mass. 196, 120 N. E. 678 (1918) (Methodist).

[39] 105 Misc. 27, 172 N. Y. Supp. 349 (1918).

[40] In Rogers *v.* Rea, 98 Ohio St. 315, 120 N. E. 828 (1918), the trust failed. On the other hand, it did not fail in Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839 (1888); CAS. TRUSTS, 334.

[41] 209 S. W. (Mo.) 104 (1919).

[42] Ely *v.* Megie, 219 N. Y. 112, 143, 113 N. E. 800 (1916). See CAS. TRUSTS, 341.

For recent contributions to the law of charitable trusts, see NOBLE, CHARITY TRUSTS UNDER MASSACHUSETTS DECISIONS, 2 ed. (1918); Bennett, "Free Churches and the

Resulting and Constructive Trusts

I. During the past year there have been many cases showing how frequently men, and women too, to whom property has been given upon an oral agreement to hold the property for the transferor or for a third person, are willing to violate their promises, relying upon the Statute of Frauds or statutes of wills. Professor Ames has shown [43] that the proper remedy in such cases is to put the parties *in statu quo*. The statute forbids going forward; it does not forbid going back. In order to prevent unjust enrichment a constructive trust should be imposed in favor of the transferor. The courts, however, are slow to adopt this view. In most cases they either allow the transferee to keep the property in spite of his promise, or they give it to the intended beneficiary in spite of the Statute of Frauds or statutes of wills. When the conveyance is *inter vivos*, they have usually done the former; [44] when it is by will, the latter.[45] In two recent decisions, however, where a transfer *inter vivos* was made on an oral trust for the transferor, it was held that the transferor might recover the property.[46] But the opposite result was reached in another case.[47] In *Reynolds* v. *Reynolds*,[48] where a testator made a bequest to his executor "in trust, however, and for the purposes of paying out and disposing of same as I have advised and directed him to do," the court held that there was a constructive trust for the testator's next of kin, although prior to the execution of the will the testator had informed the legatee of the nature of the intended trust and

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State," 34 L. Quart. Rev. 35, 174 (1918); Zollmann, "The Development of the Law of Charities in the United States," 19 Col. L. Rev. 91, 286 (1919); Sanger, "Remoteness and Charitable Gifts," 29 Yale L. J. 46 (1919).

[43] 20 Harv. L. Rev. 549; Lect. Leg. Hist. 425. As to the remedial nature of constructive trusts, see Professor Pound's remarks in 33 Harv. L. Rev. 420.

[44] Cas. Trusts, 397 *et seq.*

[45] Barron *v.* Stuart, 207 S. W. (Ark.) 22 (1918). So also where by his promise to hold for another an heir induces his ancestor to refrain from making a will. Barrett *v.* Thielen, 167 N. W. (Minn.) 1030 (1918); 28 Yale L. J. 201 (1918). See Cas. Trusts, 424, note.

[46] Simpson Grocery Co. *v.* Knight, 96 S. E. (Ga.) 872 (1918) (transfer by son to father); Hatcher *v.* Hatcher, 107 Atl. (Pa.) 660 (1919) (transfer by mother to son).

[47] McIntyre *v.* McIntyre, 171 N. W. (Mich.) 393 (1919) (transfer by brother to sister).

[48] 224 N. Y. 429, 121 N. E. 61 (1918); 28 Yale L. J. 411 (1919).

the legatee had agreed to carry out the trust. And yet if neither the existence nor the nature of the trust had appeared upon the will, the court would have given effect to the testator's intention.[49]

II. When property is conveyed to one person for a consideration paid by another, a resulting trust may be imposed on the former for the benefit of the latter. If the latter has paid only part of the purchase-price, a resulting trust *pro tanto* presumptively arises.[50] It is sometimes said that no trust will arise unless the part contributed forms an "aliquot part" of the total purchase-price, or unless it appears that the money was paid with the intention of obtaining the beneficial interest in an "aliquot part" of the property.[51] Strictly, of course, an aliquot part is one which is exactly contained in the whole without a remainder, that is, a part which can be expressed by a fraction which when reduced to its lowest terms has unity for its numerator. It has been explained by the courts, however, that the word "aliquot" is used "to mean 'a particular fraction of the whole' as distinguished from a 'general contribution to the purchase-money.' " [52] In several recent decisions it is made clear that what is really meant is this: that where one person has paid a part of the purchase-price, and his contribution to the whole price can be expressed in terms of a comparatively simple fraction (*i. e.*, one whose numerator and denominator, when the fraction is reduced to its lowest terms, are small), the presumption is that the parties intended that he should have a fractional interest in the property; but if the contribution cannot

[49] See Edson *v.* Bartow, 154 N. Y. 199, 48 N. E. 541 (1897). *Cf.* Seaver *v.* Ransom, 224 N. Y. 233, 120 N. E. 639 (1918); 32 HARV. L. REV. 82 (1918); 17 MICH. L. REV. 342 (1919); 28 YALE L. J. 95 (1918) (third-party contract). The courts in a few other states have reached the same illogical result. Blunt *v.* Taylor, 230 Mass. 303, 119 N. E. 954 (1918); 32 HARV. L. REV. 89 (1918); Olliffe *v.* Wells, 130 Mass. 221 (1881); CAS. TRUSTS, 446–451. See note 44, *supra*.

[50] Davis *v.* Dickerson, 207 S. W. (Ark.) 436 (1918). The consideration may be something other than money. Magee *v.* Magee, 233 Mass. 341, 123 N. E. 673 (1919). In that case the plaintiff was not precluded from recovering by the fact that his name was omitted as grantee because he was attempting to obtain a commission from the grantor, from whom he wished to conceal the fact that he was one of the purchasers.

[51] McGowan *v.* McGowan, 14 Gray (Mass.), 119 (1859); CAS. TRUSTS, 486. See also Briscoe *v.* Price, 275 Ill. 63, 43 N. E. 881 (1916); Watts Bros. *v.* Frith, 79 W. Va. 89, 91 S. E. 402 (1916).

[52] Skehill *v.* Abbott, 184 Mass. 145, 68 N. E. 37 (1903); CAS. TRUSTS, 489. In that case it was held that a contribution of two-fifths of the purchase price was sufficient to give the contributor a two-fifths interest in the property.

be expressed by such a simple fraction, the presumption is that the parties did not intend that the contributor should have a beneficial interest in the property, but that a loan or gift of the money contributed was intended; but in either event the presumption may be overcome by evidence of a contrary intent.[53]

III. Where a person in a fiduciary position acquires property or an interest in property, in regard to which by reason of his fiduciary position he owes a duty to another, he may be held as constructive trustee of the property or interest so acquired.[54] If, therefore, the president of a bank takes for himself the renewal of a lease of the premises on which the bank conducts its business, he may be held as constructive trustee of the interest so acquired. It was so held in *Paw Paw Savings Bank* v. *Free*.[55] In *Beatty* v. *Guggenheim Exploration Company*[56] an agent of an exploration company was sent to investigate mining claims on which the company had an option. He found and bought for himself certain other claims not included in the option, but which were necessary to the successful operation of those which were included. He was held as constructive trustee for the company.[57]

IV. The courts have had considerable difficulty with cases in which A wishes to buy land and B orally agrees to advance the money and buy the land for A and to convey it to A when reimbursed by him. B's promise as such is unenforceable because of the Statute of Frauds.[58] But if a loan of the money by B to A can be spelled out, a resulting trust can be raised, for the purchase-price is then in substance paid by A.[59] And when B's agreement

[53] For recent cases in which the court held that there was a resulting trust *pro tanto*, see Lowell *v.* Lowell, 170 N. W. (Iowa) 811 (1919) (contribution of 18/29); Hinshaw *v.* Russell, 280 Ill. 235, 117 N. E. 406 (1917) (contribution of 29/124); Jones *v.* Jones, 281 Ill. 595, 117 N. E. 1013 (1917) (contribution of 2/7, but by agreement contributor received only ¼); Koehler *v.* Koehler, 121 N. E. (Ind. App.) 450 (1919) (contributions of various amounts at various times, but by agreement all took equal shares).

[54] See Keech *v.* Sandford, Sel. Cas. Ch. 61 (1726); CAS. TRUSTS, 503.

[55] 171 N. W. (Mich.) 464 (1919). [56] 224 N. Y. 595, 122 N. E. 378 (1919).

[57] See Miller *v.* Walser, 181 Pac. (Nev.) 437 (1919). See also Healy *v.* Gray, 168 N. W. (Iowa) 222 (1918) (attorney); Johnston *v.* Loose, 201 Mich. 259, 167 N. W. 1021 (1918); 28 YALE L. J. 192 (1918) (purchase by guardian of dower interest in wards' property).

[58] See Fields *v.* Hoskins, 182 Ky. 446, 206 S. W. 763 (1918); Austin *v.* Young, 106 Atl. (N. J. Eq.) 395 (1919).

[59] McDonough *v.* O'Niel, 113 Mass. 92 (1873); CAS. TRUSTS, 484.

is to take title in the name of A, it is possible to say that B is agent of A, and if in violation of his duty as agent he takes title in his own name, he can be held as a constructive trustee. If there was a preëxisting fiduciary relationship between A and B, the courts have had no difficulty in holding B.[60] It would appear, however, unnecessary to show a preëxisting fiduciary relationship; the relationship of principal and agent for the particular transaction should be sufficient, and the Statute of Frauds does not require a writing for the creation of an agency.[61]

If A has an interest in property which is about to be cut off by sale on foreclosure, or tax sale or some similar proceeding, and B orally agrees to buy in the property and hold it for A, it is held that B becomes constructive trustee for A.[62] Although the promise may be unenforceable under the Statute of Frauds, and although it may be impossible to spell out a loan by B to A, or a fiduciary relationship between B and A, yet B is unjustly enriched at the expense of A, who, in reliance on B's promise, has allowed his interest in the property to be destroyed. The court should therefore put the parties as nearly as possible *in statu quo* by holding B constructive trustee of the property for A and compelling B to transfer it to A, when reimbursed by A.

V. In *Re A. Bolognesi & Co.*[63] it appeared that a number of persons sent funds for investment to one who, instead of making the investments, deposited the funds in his own account in a bank, and thereafter withdrew a part of his account, and subsequently made deposits of his own funds in the same account, and later became bankrupt. It was held that the claimants were entitled to a preference over general creditors to the extent of the lowest intermediate balance. There would seem to be no doubt as to this on principle or on the authorities.[64] But the court further held that this lowest intermediate balance should be shared by the

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[60] Wakeman *v.* Dodd, 27 N. J. Eq. 564 (1876); CAS. TRUSTS, 511.

[61] Havner Land Co. *v.* MacGregor, 169 Iowa, 5, 149 N. W. 617 (1915); Harrop *v.* Cole, 85 N. J. Eq. 32, 95 Atl. 378 (1914).

[62] Thomas *v.* Goodbread, 82 So. (Fla.) 835 (1919); Johnson *v.* Jameson, 209 S. W. (Mo.) 919 (1919); Rush *v.* McPherson, 97 S. E. (N. C.) 613 (1918). See also Judd *v.* Mosely, 30 Iowa, 423 (1871); CAS. TRUSTS, 514.

[63] 254 Fed. 770 (C. C. A. 2) (1918).

[64] See Scott, "The Right to Follow Money Wrongfully Mingled with Other Money," 27 HARV. L. REV. 125, 133 (1913); CAS. TRUSTS, 542–548.

various claimants in inverse order of deposit. The court applied the rule in *Clayton's Case*,[65] to the effect that withdrawals from a bank are to be considered to have been made in the order in which the deposits were made. The courts have long ceased to apply this rule when the question arises between the wrongdoer and the claimant, and so refused in the principal case. But when the question has arisen between several claimants, it is applied, as in the principal case, according to the weight of authority. The rule is based upon a presumption as to the intention of the depositor. It would seem on principle that there should be no reason to make such a presumption of intention in the case of a wrongdoer, and that his intention should be immaterial anyway. A far more just rule would be to divide the lowest intermediate balance among the various claimants in proportion to the amount of their claims.[66]

Assignment by *Cestui que Trust*

In the case of *Hill* v. *Peters*[67] a *cestui que trust* declared himself trustee of his equitable interest for the defendant and subsequently assigned his equitable interest to the plaintiff, a *bona fide* purchaser. The plaintiff gave to the trustee notice of the assignment before the defendant gave notice of the declaration of trust. It was held that the defendant should prevail. To reach this result it was necessary to hold, first, that the assignment of an equitable interest does not cut off equities; and, second, that the doctrine of *Dearle* v. *Hall*,[68] which makes priority as between successive assignees of equitable interests in personalty dependent upon priority of notice to the trustee, is not applicable to the case of a declaration of trust followed by an assignment.[69]

Spendthrift Trusts

Under the fostering care of the courts in an increasing number of states, spendthrift trusts continue to grow in popularity, although

[65] 1 Meri. 572 (1816).

[66] See 27 Harv. L. Rev. 130; Cas. Trusts, 548. A *pro rata* division was made in *Re* British Red Cross Balkan Fund, [1914] 2 Ch. 419; Cas. Trusts, 378 (resulting trust of surplus after fulfillment of express trust). *Cf.* Sinclair *v.* Brougham, [1914] A. C. 398.

[67] [1918] 2 Ch. 273; Cas. Trusts, 720.

[68] 3 Russ. 1, 48 (1828); Cas. Trusts, 619.

[69] See 32 Harv. L. Rev. 431 (1919).

they were vigorously assailed by Professor Gray and have recently been attacked by Judge Robert Grant in an interesting little book on "Law and the Family," [70] and by Professor Horack.[71] In *Hopkinson* v. *Swaim*,[72] it was held that a restraint upon the alienation of an equitable interest in fee simple is valid.[73] The courts still hold, however, that alienation of a legal estate even for life cannot be restrained,[74] and that one cannot create a spendthrift trust for his own benefit.[75]

Collusion in a Breach of Trust

There have been several recent cases dealing with the problem of the liability of a bank which receives deposits from one whom it knows to be a trustee and who is committing a breach of trust in making the deposit or who is contemplating a breach of trust in withdrawing the deposit. The bank is liable if, and only if, it knows or ought to know of the breach of trust. Under what circumstances is the bank charged with notice? According to the decisions the bank is not in general under a duty to make inquiry; the business of banking would be too dangerous if it were. But it cannot by deliberately shutting its eyes escape liability. Accordingly the bank was held liable in *British America Elevator*

[70] "The caution which prompts a parent or other testator to hedge the next generation's lives about with barbed-wire fences seems to overlook that life is a great adventure, the chief zest of which is liberty to learn by personal experience" (p. 58). "If the toll of those spoiled for world service by being left a competency in trust were set off against those who came into their own only to squander it, over which should we be disposed to shed the most tears?" (p. 62.)

[71] "Spendthrift Trusts in Iowa," 4 Iowa L. Bull. 139 (1918).

[72] 284 Ill. 11, 119 N. E. 985 (1918); 3 Minn. L. Rev. 67 (1918).

[73] See also Wallace *v.* Foxwell, 250 Ill. 616, 95 N. E. 985 (1911); Boston Safe D. & T. Co. *v.* Collier, 222 Mass. 390, 111 N. E. 163 (1916), *accord*. See Cas. Trusts, 609.

[74] Bruceton Bank *v.* Alexander, 98 S. E. (W. Va.) 804 (1919).

[75] Benedict *v.* Benedict, 261 Pa. 117, 104 Atl. 581 (1918); 32 Harv. L. Rev. 441 (1919). See Jamison *v.* Mississippi Valley T. Co., 207 S. W. (Mo.) 788 (1918).

In Kiffner *v.* Kiffner, 171 N. W. (Iowa) 590 (1919), it was held that where property was given to a trustee who was authorized to pay to the *cestui que trust* such sums as he might deem wise for the welfare of the beneficiary, the *cestui que trust* had no interest which could be reached by his judgment creditor. Salinger, J., dissented on the ground that although the *cestui que trust* could not insist that anything be paid to him, the creditor was entitled to a decree whereby he should be entitled to receive whatever the trustee should decide to pay under the terms of the trust. See in accord with the dissenting opinion: *Re* Coleman, 39 Ch. D. 443 (1888); *Re* Bullock, 60 L. J. Ch. 341 (1891); Cas. Trusts, 613–619; Gray, Restraints on Alienation, 2 ed., § 167*j*.

Co. v. *Bank of British North America*,[76] *Tesene* v. *Iowa State Bank*,[77] and *Blanton* v. *First National Bank*;[78] but escaped in *Taylor* v. *Astor National Bank*[79] and *Corn Exchange Bank* v. *Manhattan Savings Institution*.[80] Of course a bank which has notice of the trust character of a deposit has no lien or right of set-off for a personal indebtedness of the trustee.[81]

Liability of Trust Estate

In *Jessup* v. *Smith*[82] some of the beneficiaries of a trust began a proceeding to remove a trustee, who retained the plaintiff as his counsel, telling him that he, the trustee, was poor and unable to pay counsel fees and that the plaintiff would have to look to the estate for payment. The application to remove the trustee was denied. The plaintiff then brought an action, joining as defendants all persons interested in the estate and praying that the value of his services be declared a charge upon the trust estate. The lower court dismissed the complaint on the ground that the services were not beneficial to the estate. The Court of Appeals reversed the judgment, holding that since by the contract the plaintiff was to look to the estate he was entitled to payment out of the estate. The decision seems sound.[83]

In *Strong* v. *Dutcher*[84] one of the *cestuis que trust* retained the plaintiff, an attorney, to prevent the trustee from wasting the estate. The plaintiff agreed to look to the trust fund for compensation. It was held that the estate was liable, on the ground that the *cestui que trust* would have had a lien on the estate for expenses incurred in its preservation and that she could transfer the lien to the plaintiff. The decision seems sound.[85]

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[76] [1919] A. C. 658.

[77] 173 N. W. (Iowa) 918 (1919).

[78] 136 Ark. 441, 206 S. W. 745 (1918).

[79] 105 Misc. 386, 174 N. Y. Supp. 279 (1918).

[80] 105 Misc. 615, 173 N. Y. Supp. 799 (1919). This case seems to go too far. See 19 Col. L. Rev. 72. See cases cited Cas. Trusts, 739.

[81] Pratt *v.* Commercial Trust Co., 105 Misc. 324, 174 N. Y. Supp. 88 (1918).

[82] 223 N. Y. 203, 119 N. E. 403 (1918); Cas. Trusts, 766.

[83] See Cas. Trusts, 769, note.

[84] 186 App. Div. 307, 174 N. Y. Supp. 352 (1919); 19 Col. L. Rev. 159 (1919).

[85] There have been several recent cases dealing with the question of taxes payable in respect of trust estates, which have been discussed by Professor Beale in the pages of this Review. 32 Harv. L. Rev. 619–623; 33 *ibid.* 7, 8. See also Williams *v.* Singer, [1919] 2 K. B. 108. And see Cas. Trusts, 743–748. By Cal. Laws, 1919, c. 237,

Investments

In determining what investments should be made, the trustee should in general be governed by express directions in the trust instrument. In extraordinary cases, however, when unforeseen emergencies have arisen making it impossible or clearly unwise to follow those directions, a departure from them may be justified. In *Matter of London* [86] a will directed trustees to invest in railroad bonds. It was held that they were justified in investing in United States bonds of the first Liberty Loan issue. It may well be questioned whether the emergency was such as to justify the departure from the terms of the will. Certainly the trustees ran a great risk in not first obtaining the permission of the court to make the unauthorized investment.

Even where the trust instrument provides that the trustee shall not be limited by the "rules governing investments by executors or trustees," and that "in the matter of investment his discretion shall be absolute and uncontrolled," it is nevertheless a breach of trust for the trustee to lend to himself. It was so held in *Carrier* v. *Carrier*.[87]

Capital and Income

In dealing with the rights of life tenants and remaindermen to extraordinary dividends, it appears that the tendency of the courts is more and more toward the acceptance of the Pennsylvania rule of apportionment, rather than the Massachusetts rule which holds all cash dividends income and all stock dividends capital. In *Rhode Island Hospital Trust Company* v. *Peckham*,[88] the Supreme Court of Rhode Island held that extraordinary cash dividends declared out of assets earned before the creation of the trust are to be treated as capital. In *Re Duffill's Estate* [89] it was held by the Supreme Court of California that stock dividends declared out of

it is provided that the trustee of stock shall not be liable for assessments if the stock is registered in his name as trustee or if the corporation has notice of the trust and of the identity of the *cestuis que trust*, but that the *cestuis que trust* shall be liable in such case. *Cf.* Lewis *v.* Switz, 74 Fed. (C. C. Neb.) 381 (1896); Cas. Trusts, 741.

[86] 104 Misc. 372, 171 N. Y. Supp. 981 (1918); 32 Harv. L. Rev. 181 (1918); Cas. Trusts, 791.

[87] 226 N. Y. 114, 712, 123 N. E. 135 (1919).

[88] 107 Atl. (R. I.) 209 (1919); 68 U. of Pa. L. Rev. 85 (1919).

[89] 183 Pac. (Cal.) 337 (1919).

income earned during the life of the trust are to be treated as income. On the other hand, the Supreme Judicial Court of Maine in *Harris* v. *Moses*,[90] and the Supreme Court of Appeals of West Virginia in *Security Trust Co.* v. *Rammelsburg*[91] (two judges dissenting), following the Massachusetts rule, have held that stock dividends are capital although declared out of income earned during the life of a trust. In Massachusetts an extraordinary cash dividend was held to be income, although stockholders were given the right to apply it in subscribing for new stock at less than its market value, and although the trustees did so apply it.[92] In the case just referred to, it was also held that a dividend payable in stock of a subsidiary company is to be treated as income, although in jurisdictions following the Pennsylvania rule such dividends are apportioned like all other dividends.[93]

Business Trusts

The Massachusetts device of creating a trust for the carrying on of a business is rapidly growing in popularity. Express provisions for the creation of business trusts were adopted in Oklahoma by a recent statute[94] allowing such trusts to be created by a recorded instrument, limiting the life of the trust to twenty-one years or the lives of the beneficiaries, and providing that the trust estate shall be liable to third persons for acts of the trustees when acting as such, but that no personal liability shall attach to the

[90] 104 Atl. (Me.) 703 (1918). [91] 97 S. E. (W. Va.) 122 (1918).

[92] Smith *v.* Cotting, 231 Mass. 42, 120 N. E. 177 (1918). The "rights" were held to be capital. For other recent decisions as to stock subscription "rights," see Baker *v.* Thompson, 181 App. Div. 469, 168 N. Y. Supp. 871, affirmed 224 N. Y. 592, 120 N. E. 858 (1918) (capital); *Re* Thompson's Estate, 262 Pa. 278, 105 Atl. 273 (1918) (apportionable). See 18 Col. L. Rev. 496 (1918).

[93] Krug *v.* Mercantile Tr. & Deposit Co., 104 Atl. (Md.) 414 (1918); U. S. Trust Co. *v.* Heye, 224 N. Y. 242, 120 N. E. 645 (1918); Matter of Megrue, 224 N. Y. 284, 120 N. E. 651 (1918).

For recent decisions allowing apportionment of dividends on liquidation, see *Re* McKeown's Est., 263 Pa. 78, 106 Atl. 189 (1919); R. I. Hosp. T. Co. *v.* Bradley, 103 Atl. (R. I.) 486 (1918).

For recent decisions as to what is income under the federal Income Tax Acts, see Towne *v.* Eisner, 245 U. S. 418 (1918) (stock dividends not taxable under act of 1913); Lynch *v.* Hornby, 247 U. S. 339 (1918) (cash dividends out of earnings accruing prior to 1913 held taxable); Peabody *v.* Eisner, 247 U. S. 347 (1918) (distribution of shares of subsidiary companies held taxable).

[94] Okla. Laws, 1919, c. 16.

trustees or the beneficiaries for such acts. In *Crocker* v. *Malley*[95] it was held that such a trust is not taxable as an association under the federal Income Tax Act of 1913. In *Sleeper* v. *Park*[96] it was held that the trustees were all liable as partners for the negligence of one of the trustees which resulted in an injury to the plaintiff, a third party. If the direction and control of the details of the business are retained by the beneficiaries, then they also may be held personally liable as partners.[97]

Termination of Trusts

The doctrine of *Claflin* v. *Claflin*[98] has been accepted in Connecticut by the Supreme Court of Errors in the recent case of *De Ladson* v. *Crawford*.[99] In that case a testator left property to a trustee with a direction to pay the income to his niece for ten years and at the end of that period to pay her the principal. No one except the niece was given any beneficial interest in the property. The court held that the provision for postponement of enjoyment was valid, and that the niece could not insist on a termination of the trust before the expiration of the ten-year period.[100] The court was not impressed by the English decisions to the opposite effect nor by Professor Gray's arguments.[101] In a dictum the court expressed the view that the provision for postponement would be valid against an assignee of the beneficiary as well as against the beneficiary herself. This is probably right, for otherwise the restraint would be a mere form.[102]

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[95] 249 U. S. 223 (1919); 33 Harv. L. Rev. 118 (1919); 28 Yale L. J. 690 (1919).

[96] 232 Mass. 292, 122 N. E. 315 (1919).

[97] Horgan *v.* Morgan, 233 Mass. 381, 124 N. E. 32 (1919). See Cas. Trusts, 774, note. In Cunningham *v.* Bright, 228 Mass. 385, 117 N. E. 909 (1917), 29 Yale L. J. 97 (1919), it was said that when the trustee of a business trust acquires the whole beneficial interest, the trust ends by merger.

In Kimball *v.* Whitney, 233 Mass. 321, 123 N. E. 665 (1919), it was held that it was not necessarily improper in Massachusetts for a trustee to invest in preferred shares of a business trust, although the trust in question amounted to a partnership.

[98] 149 Mass. 19, 20 N. E. 454 (1889); Cas. Trusts, 828.

[99] 106 Atl. (Conn.) 326 (1919).

[100] In Odom *v.* Morgan, 177 N. C. 367, 99 S. E. 195 (1919), an attempt to postpone enjoyment of the corpus for ten years was unsuccessful because the testator devised the legal estate to the beneficiary. See 33 Harv. L. Rev. 324.

[101] Gray, Rule against Perpetuities, 3 ed., § 120.

[102] Gray, Restraints on Alienation, 2 ed., § 124, note.